APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 133—September Term, 1965.

(Argued November 8, 1965 Decided April 21, 1966.)

Docket No. 29935

In Re the Petition

—of—

PETROL SHIPPING CORPORATION, as owner of tanker ATLANTIS, *Petitioner-Appellee,*

for an order directing

THE KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Respondent-Appellant,*

to proceed to arbitration.

Before: LUMBARD, *Chief Judge,* FRIENDLY and SMITH, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Wilfred Feinberg, *District Judge,* 37 F. R. D. 437, directing respondent to proceed to arbitration, United States Arbitration Act, 9 U.S.C. § 4, despite its plea of sovereign immunity. Affirmed.

ELI ELLIS, New York, N. Y. (Robert W. Mullen, and Hill, Betts, Yamaoka, Freehill & Longcope, New York, N. Y., on the brief), *for petitioner-appellee.*

ARTHUR M. BECKER, New York, N. Y. (Nixon, Mudge, Rose, Guthrie & Alexander, New York, N. Y., on the brief), *for respondent-appellant.*

SMITH, *Circuit Judge:*

Respondent Kingdom appeals from an order of the United States District Court for the Southern District of New York, Wilfred Feinberg, *District Judge,* directing it to proceed to arbitration. We find no error and affirm the order.

Petrol Shipping, as owner of the tanker *Atlantis,* entered into a written charter party with respondent dated February 12, 1960, in New York City, and agreed thereby to transport grain acquired by respondent from the United States government pursuant to an agreement between the two governments. The United States was acting under the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. 1691, et seq. The grain was to be shipped from Houston, Texas, and/or Baton Rouge, Louisiana, to Piraeus, Greece.

The shipment apparently had to be transported at least 50% by U. S. flag vessels, of which *Atlantis* is one. See 46 U.S.C. 1241(b). The ship sustained bottom damage at the discharge berth in Piraeus, allegedly due to an unsafe berth, but the charterer disclaimed responsibility. The shipowner alleged damages were about $287,000.

The charter party contained the following arbitration clause:

> Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

By letter of September 29, 1961 the shipowner named its arbitrator, and demanded that the charterer appoint its;

a further demand was made on December 15, 1961. Although respondent said that it had advised its Foreign Trade Administration in Washington to proceed, no arbitrator was named.

On January 14, 1963 Petrol brought this petition in the District Court for the Southern District of New York, under § 4 of the United States Arbitration Act, 9 U.S.C. § 4. Service of process was allegedly effected by ordinary mail to respondent's Ministry of Trade, State Purchase Directorate, Washington; to Becker & Greenwald, described as proctors for the Directorate; and to respondent's ministry of Commerce, Purchase Directorate, New York City.

The charterer appeared specially, and submitted a suggestion of the Greek Ambassador, that as Greece was a friendly sovereign and therefore immune, the court lacked jurisdiction. No advice from the State Department was transmitted to the court. The District Court, Judge Dawson, denied the petition to compel arbitration on February 21, 1963, on the ground of sovereign immunity.

This judgment was affirmed by a panel of this court, 326 F. 2d 117 (2 Cir. 1964), with Judge Clark dissenting, and suggesting the matter should be reversed and remanded to ascertain the position of the State Department. On rehearing *en banc*, 332 F. 2d 370 (2 Cir. 1964), *per curiam*, the United States Department of Justice having submitted an *amicus curiae* brief, the matter was remanded for further development of facts. The case was assigned to Judge Feinberg.

Before the District Court heard the case on remand, a panel of this court decided *Victory Transport, Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354 (2 Cir. 1964), cert. den. 381 U.S. 934 (1965), a case substantially similar in its facts to the present case, holding that a branch of the Spanish Ministry of Com-

merce could be sued without its consent in that suit, and despite its plea of immunity.

On remand in this case, the parties entered into a stipulation in lieu of a hearing, and introduced exhibits, including the Charter Party and certain documents of correspondence with the State Department. These documents were a request by the Greek Ambassador to the State Department for recognition of immunity and a letter from counsel for petitioner to the Legal Advisor of the State Department asking that the Department decline the Ambassador's request, and citing *Victory Transport;* the reply of the State Department, declining to recognize any sovereign immunity in the case, on the ground that the matter was *jure gestionis,* and deferring the Ambassador to the Tate letter; and a reply of the Legal Advisor to counsel for petitioner, noting that the Department had declined to intervene.

The District Court requested an *amicus suriae* brief from the United States, but the government declined, in view of the controlling nature of *Victory Transport.* By opinion of June 4, 1965, the court directed the Kingdom to proceed to arbitration, refusing to recognize any immunity, relying on *Victory Transport.* 37 F. R. D. 437 (S.D.N.Y. 1965). The Kingdom appeals.

The proper theoretical approach to the issues in this case is indicated by the brief of the United States as *amicus curiae* in the rehearing *en banc.* There, at page 17, the brief states,

> the immunity of sovereign did not present a "jurisdictional" defect such as improper service might. Under the Supreme Court's analysis [in *Ex Parte Peru,* 318 U.S. 578 (1943)], it appears that in an action against a sovereign just as in any other suit, jurisdiction must be acquired either by service of process, or by the defendant's appearance in court, or

> *in rem* by seizure and control of property. Only after such jurisdiction is acquired, does the sovereign immunity defense property [sic] come into consideration. Instead of being a "jurisdictional" matter in the same sense as acquiring jurisdiction over a person or property, sovereign immunity presents a ground for relinquishing the jurisdiction previously acquired.

The first issues, then, deal not with immunity, but rather with jurisdiction *in personam* and the adequacy of service

I. JURISDICTION

In *Farr & Co.* v. *Cia Intercontinental de Navigacion,* 243 F. 2d 342 (2 Cir. 1957), this court held that in a suit under the Arbitration Act, where the parties had agreed to arbitrate and that "this submission may be made a rule of court by either party," by agreeing to arbitrate in New York a party "makes himself as amenable to suit as if he were physically present in New York." 243 F. 2d at 347. *Farr* was followed in *Orion S. & T. Co.* v. *Eastern States Petro. Corp. of Panama,* 284 F. 2d 419 (2 Cir. 1960), where the contract read, "for the purpose of enforcing awards this agreement shall be made a Rule of of [sic] Court." Although the suit was to compel arbitration, not to enforce an award, the court concluded that as in *Farr* the parties were as if physically present. We conclude that this states a rule of federal law, under the Arbitration Act.

Here the contract reads, "for the purpose of enforcing any award, this agreement may be made a rule of the Court." This is not appreciably different from the *Orion* contract, and as was said in *Victory Transport,* "the fine distinction" between a submission to enforce an award and a general submission "did not trouble this court in *Orion* . . . Implicit in the agreement to arbitrate is consent to enforcement of that agreement." 336 F. 2d at 363, 4.

The fact that one party is a branch of a foreign sovereign does not affect the conclusion that by entering into an

arbitration agreement containing a submission such as here, the sovereign becomes amenable to suit. The question of immunity does not bear on the question of amenability, or personal jurisdiction. What *Farr* and *Orion* compel is that the Kingdom be treated as if it is physically present.

Moreover, the branch of respondent being sued is actually present. The Purchase Directorate maintains an office in New York, the one served; and it negotiated the charter party in New York, perhaps at that same office. Thus no doctrine of constructive presence by consent is necessary.

II. Service

Regardless, however, of what theory makes the Purchase Directorate present, service must be adequate. Here *Farr* again arguably controls. *Farr* may be read as meaning that an arbitration agreement such as construed there gives consent to service by any method designed to give adequate notice, as well as consent to personal jurisdiction, all as a matter of federal law. In fact, however, *Farr* says that applicable *New York* law is that consent to jurisdiction includes consent to service by any method consistent with due process.

Farr was a suit against a foreign corporation. Once it was held that service was adequate under New York law, that service sufficed in federal court by virtue of Rule 4 (d)(7), Federal Rules of Civil Procedure. But that provision applies only to parties described in Rule 4(d)(1) or (3), and in our view respondent is not one of them.

It is, of course, not an individual, and Rule 4(d)(1) is inapplicable. Rule 4(d)(3) is not a catch-all for categories of parties not otherwise considered in Rule 4. The only entity covered in 4(d)(3) that is remotely like respondent is "other unincorporated assoication which is subject to suit under a common name." Beyond a doubt, if the Purchase Directorate is subject to suit, it may be sued under a common name, because a right under the Arbitration Act

is surely "a substantive right existing under the . . . laws of the United States." Rule 17(b); see *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1922). The only question, then, is whether respondent is an association.

An association ought not to be defined to include an entity which lacks membership; respondent is essentially merely an agency of the Greek government. Neither Rule 4(d)(3), nor any other part of Rule 4, provides for service on such a party. And even if respondent were within Rule 4(d)(3), so that service according to state practice sufficed, since New York does not provide for service on respondent in the manner used here, there would be some difficulty in service.[1]

But the fact that Rule 4 does not provide a method for service on respondent does not mean that no service could be effective. Rule 83 permits "each district court, by a majority of the judges thereof" to "make and amend rules governing its practice not inconsistent with these rules."

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[1] There is no general provision for service on an association because under New York law an unincorporated association may not sue or be sued in its own name, *Kirkman* v. *Westchester Newspapers*, 261 App. Div. 181, 24 N. Y. S. 2d 860 (1st Dept. 1941), *aff'd* 287 N. Y. 373 (1942); *Rosen* v. *Alleghany Corp.*, 133 F. Supp. 858, 867 (S. D. N. Y. 1955), although it may be sued in the name of its president or treasurer, N. Y. General Associations Law, § 13. See Commentary accompanying McKinney's N. Y. C. P. L. R. 311, p. 499.

Rule 4(d)(7) permits service "in the manner prescribed by the law of the state . . . for the service of a summons or other like process upon any such defendant [as appears in Rule 4(d)(3)] in an action brought in the courts of general jurisdiction of that state." For arbitration actions in New York service at the time of this suit was governed by N. Y. C. P. A. § 1450, providing for personal service, substituted service, or service as the court directs, none of which occurred here. Contrast N. Y. C. P. L. R. 403(c), which now governs service in all special proceedings. Since in our view respondent is not within Rule 4(d)(3), we do not decide whether the power to direct proper service under § 1450 subsumed the power to approve service later.

The Rule goes on to say, "in all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." See also 28 U.S.C. § 2071.

Rule 15 of the Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York says:

> Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Rules of Civil Procedure, or of the Rules of the United States District Courts for the Eastern and Southern Districts of New York, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States shall be applied, or in default thereof, in the discretion of the court, the procedure which shall then prevail in the Supreme Court or the Surrogates Court as the case may be of the State of New York may be applied.

And when there is no Federal Rule, and no local rule, the court may fashion one not inconsistent with the Federal Rules. Rule 83, *supra;* see *In re United Corp.*, 283 F. 2d 593 (3 Cir. 1960). There is no compelling reason why the court must fashion the rule in advance, although the better practice in a case such as this might be to secure an advance ruling, approving a given method of service.

But if neither service under Rule 4, or under a local rule was available here, and, for some reason, that part of Rule 83 authorizing *ad hoc* rules could not be used, then the court may fashion a rule outside the Federal Rules altogether, although this really amounts to the same thing as the *ad hoc* provisions of Rule 83. *Story* v. *Livingston,* 38 U.S. 196 [13 Peters 359] (1839) arose during the Equity Rules, uni-

form rules governing equity practice in the federal courts, like the Federal Rules today, but unlike the rules governing practice on the law side, which conformed to state practice. In *Story* the court observed:

> We think the occasion, however, a proper one for this court to remark, if any such rule [one abolishing equity] has been made by the district court in Louisiana, that it is in violation of those rules which the Supreme Court of the United States has passed to regulate the practice in the courts of equity of the United States. They are as obligatory upon the courts of the United States in Louisiana, as they are upon all other United States courts; and the only modifications or additions which can be made in them by the circuit or district courts, are such as shall not be inconsistent with the rules prescribed. 38 U.S. at 201.

The court went on to say that where the rules were silent, the lower courts should look to the practice of the high court of chancery in England.

Similarly it was held that where state law did not indicate any rule of practice on the law side to which the federal law court could conform, the court should make its own rule, consistent with common law principles. Thus it was held that where a state had not prescribed a method of service, so that the Conformity Act did not provide the federal court with any method, service according to common law rules sufficed. *Barrow S.S. Co.* v. *Kane,* 170 U.S. 100 (1898); *Kaufman* v. *Garner,* 173 Fed. 550, 554 (W.D. Ky. 1909) ("general principles of jurisprudence").

In our view there is no inconsistency with the Rules in approving service in this case by ordinary mail on the respondent at its address within the state. Since Rule 4 is silent as to respondent, there is no competing method of service authorized by the Rules which may be said to have been intended to be exclusive. And the fact that service here is in a method which the Rules do not adopt directly

for other types of parties is not a compelling distinction; state rules often adopt differing modes of service, and these are used in the federal courts through Rule 4(d)(7).[2]

Since respondent is not one of the parties dealt with in Rule 4(d)(3), our decision in *Arrowsmith* v. *United Press International*, 320 F. 2d 219 (2 Cir. 1963) that whether a foreign corporation has done enough to make it present so that service on it under that Rule and under Rule 4(d)(7) will give jurisdiction is to be determined in the first instance by state law, is not directly in point. Moreover, we do not equate "presence," or amenability to suit, with service of process, as our treatment of these two questions here indicates, and we regard Rule 4 as speaking to service alone, and not both service and amenability. Since, unlike in *Arrowsmith*, where "presence" was not treated at all in the Rules, federal law has partly treated the question of service, in Rule 4, it is appropriate to look to federal law to fill in any gaps in that Rule.

In *Arrowsmith* it was "[o]ur belief that neither the federal legislature nor the federal rule-makers have had any intention to displace state statutes as to the taking of jurisdiction over foreign corporations in ordinary diversity cases . . ." 320 F. 2d at 227. We deal here with a *casus omissus* both in the Federal Rules and in New York law. The absence of provision in either as to the manner of serving a foreign government cannot reasonably be considered to manifest a policy that no *in personam* actions against foreign sovereigns could ever be brought. It reflects rather that until the treaties and declarations of the decade beginning in 1948, restricting immunity of foreign

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[2] We do not base our decision on the question of service on the argument that the making of the Charter Party with the New York Commercial Men's arbitration clause and the actual presence of respondent's Purchase Directorate amounted to a consent to service in any manner consistent with due process. Contrast *Farr & Co.* v. *Cia Intercontinental de Navigacion, supra,* where constructive presence operated to give consent to service.

governments to public or sovereign acts, see *Victory Transport, Inc., supra,* 336 F. 2d at 357-8, there was no occasion to make provision for service upon them, and that legislators and rule-makers have failed to catch up in their procedural provisions with the more substantive developments in this field of law. Moreover, in sharp contrast to diversity actions against foreign corporations, the fashioning of provisions with respect to service on foreign governments is a task peculiarly appropriate for federal courts. Compare *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 423-7 (1964).

In the light of the above, we are not disposed to follow *Oster* v. *Dominion of Canada,* 144 F. Supp. 746 (N.D. N.Y.), aff'd 238 F. 2d 400 (2 Cir. 1956), cert. den. 353 U.S. 936 (1957),[3] or *Purdy Co.* v. *Argentina,* 333 F. 2d 95 (7 Cir. 1964), cert. den. 379 U.S. 962 (1965), to the extent they hold that a sovereign cannot be served in federal court. See also *Berlanti Const. Co.* v. *Republic of Cuba,* 190 F. Supp. 126 (S.D.N.Y. 1960), where personal service in Havana, Cuba, on the Minister of the Presidency of the Republic of Cuba, was held invalid under Rule 4(d)(7).

This is not to say that service on the sovereign may be effected on any representative of the sovereign. See *Hellenic Lines, Ltd.* v. *Moore,* 345 F. 2d 978 (D.C. Cir. 1965). We hold only that service on the branch which is a party to the contract sued on is sufficient.

Finally, it has not been suggested, nor do we believe, that the service here was inconsistent with due process.

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[3] The court in *Oster* relied on *Clark County, Nev.* v. *City of Los Angeles,* 92 F. Supp. 28 (D. Nev. 1950), for the proposition that there is no authority for service of process in a manner other than is set forth in the Federal Rules. But in *Clark,* suit was against a municipal corporation, a category of defendant service on which is covered by the Rules. Rule 4(d)(6). That method, of course, is exclusive; but the case is not authority for the holding in *Oster,* since the Rules are silent as to the category of defendant there.

III. Immunity

On the question of sovereign immunity this case is identical to *Victory Transport, Inc., supra,* p. 1668. There this court held that the claim of sovereign immunity would be denied when made by a branch of the Spanish Ministry of Commerce which entered into a voyage charter containing the same arbitration clause as here, for the transport of wheat purchased under the Agricultural Trade Development and Assistance Act, as here. Suit was to compel arbitration.

Moreover, although in *Victory Transport, Inc.* there had been no advice from the State Department to the court, here there is in evidence the letter from the Department to the Kingdom's representative, rejecting the claim of sovereign immunity, on the ground that "the acts on which the suit is brought are private acts (jure gestionis)," and appending the Tate letter adopting the restrictive theory of sovereignty.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of April, one thousand nine hundred and sixty-six.

Present: HON. J. EDWARD LUMBARD, *Chief Judge*, HON. HENRY J. FRIENDLY, HON. J. JOSEPH SMITH, *Circuit Judges*.

In Re the Petition of

PETROL SHIPPING CORPORATION, as owner of TANKER ATLANTIS, *Petitioner-Appellee*,

v.

THE KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Respondent-Appellant*.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

FEINBERG, *D. J.*

This case is before the court after remand from the Court of Appeals for the Second Circuit. Petitioner Petrol Shipping Corporation, owner of the tanker "Atlantis," seeks an order compelling respondent, the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, to proceed to arbitration. Petitioner and respondent were parties to a charter party, dated February 12, 1960, by which the tanker "Atlantis" was chartered for the carriage of a cargo of grain from American ports to Piraeus, Greece. The charter party contained an aribtration clause. The cargo to be carried was a cargo of bulk grain sold by the United States to the Kingdom of Greece, under an agreement between the United States and Greece made pursuant to the Agricultural Trade Development and Assistance Act, 68 Stat. 454, 7 U.S.C. §§ 1691-1736, providing for the sale of surplus agricultural commodities.

The petition is brought pursuant to section 4 of the United States Arbitration Act, 9 U.S.C. § 4. It alleges that the "Atlantis" proceeded to a berth in Piraeus designated by respondent, but that the berth was not a safe one and, as a result, the vessel suffered damages of approximately $287,000. The petition also sets forth the arbitration clause, states that petitioner has designated its arbitrator and that respondent has failed to appoint its arbitrator, although due notice of aribtration and demand therefor has been served by petitioner. The petition was filed in this court in January 1963, and thereafter, in a memorandum by Judge Dawson, dated February 21, 1963, a motion for an order directing the Kingdom of Greece to proceed to arbitration was denied. The basis of denial

was that respondent asserted its sovereign immunity to suit. On appeal, the order was at first affirmed by a panel of the court of appeals. *Petrol Shipping Corp.* v. *Kingdom of Greece,* 326 F. 2d 117 (2d Cir. 1964). Thereafter, a rehearing en banc was granted, and in a per curiam decision dated May 25, 1964, after consideration of a brief filed by the United States as amicus curiae, the court of appeals vacated the judgment of the district court dismissing the petition and remanded the case "with instructions to take such evidence as is relevant to the contentions of the parties and to make a further determination in the light thereof and the arguments made thereon by the parties and, if the District Court deems desirable, by the United States." 332 F. 2d 370 (2d Cir. 1964). On August 12, 1964, following the death of Judge Dawson, the matter was ordered to be heard in this court on October 5, 1964.

On September 9, 1964, the court of appeals issued its opinion in *Victory Transport, Inc.* v. *Comisaria General,* 336 F. 2d 354 (2d Cir. 1964), *cert. denied,* 33 U.S.L. Week 3383 (U.S. June 1, 1965). In that case, which is remarkably similar on its facts to this case, the court affirmed an order compelling arbitration between the owner of a ship and a branch of the Spanish Ministry of Commerce. Petitioner there claimed hull damage in discharging cargo in an allegedly unsafe Spanish port, which had been designated as a safe port. The arbitration clause was identical to the arbitration clause involved in this case. In that case, the court held, among other things, that it would follow the distinction recognized by the State Department between a sovereign's private and public acts and that the chartering by respondent of a ship to transport a purchase of wheat partook "far more of the character of a private commercial act than a public or political act." 336 F. 2d at 360. Accordingly, the court denied the claim of sovereign immunity. The court also held that by agreeing to arbitrate in New York, respondent in that case consented

to the jurisdiction of the court that could compel the arbitration proceeding in New York.

In September 1964, respondent in this case sought an adjournment of the scheduled October hearing on remand to allow the Greek government to make a formal application to the United States Department of State presenting a claim of foreign sovereign immunity. The adjournment was granted and the application was made. The Secretary of State denied the plea for sovereign immunity. Thereafter, in lieu of a formal hearing before this court, the parties, on October 29, 1964, entered into a stipulation as to certain facts and exhibits, with the understanding that the court would then rule upon the renewed motion of petitioner for an order directing respondent to proceed to arbitration. Following the suggestion appearing in the circuit court opinion dated May 25, 1964, the court invited the United States to submit an amicus brief containing any suggestions or comments which the United States felt might be appropriate with respect to the record or the contentions of the parties. By letter dated November 18, 1964, from John W. Douglas, Assistant Attorney General, Civil Division, Department of Justice, the United States declined the invitation. In its letter, the government referred to the *Victory Transport* decision, *supra,* which it characterized as involving "circumstances that appear to be identical to those of the present case." In late November, final briefs were filed with this court by the parties. On January 7, 1965, a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was filed in the *Victory Transport* case by the same law firm that represents the Greek government here. On June 1, 1965, the petition was denied. 33 U. S. L. WEEK 3383.

In its brief here, the Greek government agrees that the *Victory Transport* decision is similar to the instant case. Although it urges that the decision there was erroneous, it recognizes that this court is bound by the decision in that case and urges only two further points for consideration:

(1) The purported service of process on respondent was invalid and its invalidity cannot be cured; and (2) there has been no consent to the jurisdiction of the district court.

With regard to the service of process, the court of appeals in *Victory Transport* stated the following (336 F. 2d at 364):

> The appellant has also challenged the propriety of the extraterritorial service employed here. But since the appellant [h]as consented beforehand to the jurisdiction of the district court, the sole function of process in this case was, as Judge Murphy correctly noted below, to notify the appellant that proceedings had commenced. This function was certainly performed. Moreover, similar service of process on nongovernmental foreign corporations was held sufficient in the Farr and Orion cases, supra. No rule of international law requires special treatment for serving branches of foreign sovereigns. . . .

In this case, as in *Victory Transport,* respondent has consented beforehand to the jurisdiction of the district court, and the notice function of process has been performed.

On the issue of consent, respondent contends that under Greek law the representatives of the Purchase Directorate of the Ministry of Commerce who signed the charter party lacked authority to agree to arbitration. This point is raised for the first time in respondent's memorandum submitted after the parties had formally stipulated the facts and exhibits.[1] The Greek law relied upon is set out in the memorandum prepared by counsel presumably not expert in Greek law; appended to the memorandum are English and Greek versions of the assertedly relevant foreign legal materials. No other proof has been offered in the form of affidavits or otherwise, except an affidavit stating that the

[1] The memoranda were filed pursuant to instructions by the court. Transcript of conference on October 29, 1964, p. 6.

translation of the Greek Code into English is accurate. Indeed, it is respondent's position that "this Court may and should take judicial notice of the referenced provisions of Greek law. . . ."[2]

For purposes of this question, I will assume, without deciding, that the issue of authority to agree to arbitrate is for the court[3] on a motion to compel arbitration under 9 U.S.C. § 4.[4] Respondent cites Rule 4511(b) of the N. Y. CPLR as applicable under FED. R. CIV. P. 43(a).[5] This rule provides:

> Every court may take judicial notice without request of . . . the laws of foreign countries. . . . Judicial notice shall be taken . . . if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or prior to the presentation of any evidence at the trial, but the court may require or permit other notice.

Obviously, on the basis of the papers before me, this is not a case in which the court "shall" take judicial notice upon request. We are here concerned with the internal powers of a foreign government, and the applicable language and legal code is Greek (literally and figuratively). The paucity of proof supplied to the court has already been de-

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[2] Memorandum for the Kingdom of Greece, p. 9 n.1.

[3] See Moseley v. Electronic Missile Facilities, 374 U.S. 167 (1963); American Airlines, Inc. v. Louisville & Jefferson County Air Board, 269 F. 2d 811 (6th Cir. 1959); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402 (2d Cir. 1959), *cert granted*, 362 U.S. 909, *cert. dismissed by stipulation*, 364 U.S. 801 (1960). I do not intend by this statement to preclude an arbitrator from considering this issue.

[4] The statute requires the court to order arbitration "upon being satisfied that the making of the agreement . . . is not an issue."

[5] That the Federal Rules of Civil Procedure apply to proceedings under Title 9, U. S. C., see FED. R. CIV. P. 81(a)(3).

scribed. Under these circumstances, it cannot be seriously contended that counsel has furnished "the court sufficient information to comply with the request."[6]

Neither do I choose to take judicial notice of the Greek law as a matter of discretion. The difficulties of language, the insubstantial assistance provided by respondent's counsel, and the court's unfamiliarity with the legal system involved alone persuade me not to exercise my discretion as respondent requests. Moreover, there are indications that under the circumstances an opposite choice would be error. *Walton* v. *Arabian-American Oil Co.*, 233 F. 2d 541, 544 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956). *Cf. Wall Street Traders, Inc.* v. *Sociedad Espanola de Construction*, 236 F. Supp. 358 (S.D. N.Y. 1963); *Telesphore Couture* v. *Watkins*, 162 F. Supp. 727 (E.D. N.Y. 1958). Additionally, during the course of these protracted judicial and diplomatic proceedings, respondent had ample opportunity to present its foreign law contention and the evidence to back it up. It has chosen to hold back from the traditional route of proving the applicable Greek law as a matter of fact.[7] Failure to do so under these circumstances likewise militates against a discretionary exercise of judicial notice.

Since I will not take judicial notice of Greek law,[8] and there is no evidence in the record on which to base a find-

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[6] The question of notice to the other party of reliance on foreign law raised by Rule 4511(b) need not be decided.

[7] Although there is no motion before me to reopen the proceedings to take testimony on the issue of Greek law, I take this opportunity to indicate that I would not be disposed to granting such a request. Perhaps the arbitrator will consider this point.

[8] A further argument might be based on the recognition that the Arbitration Act is not an independent basis of jurisdiction. Another traditional basis of federal jurisdiction is needed—in this case, maritime. This raises the question whether, in an admiralty case, internal rules of foreign law can be judicially noticed. See Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd., 336 U.S. 386, 396 (1949); Bournias v. Atlantic Maritime Co., 220 F. 2d 152, 157 (2d Cir. 1955).

ing of lack of authority, this contention fails. Accordingly, petitioner's motion is granted. So ordered.

Dated: New York, N. Y.
June 4, 1965

WILFRED FEINBERG
U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 119—September Term, 1963

(Argued October 30, 1963 Decided January 7, 1964.)

Rehearing In Banc Granted

(March 12, 1964—Decided May 25, 1964.)

[332 F. 2d 370]

PETITION OF PETROL SHIPPING CORPORATION,
Petitioner-Appellant,

v.

THE KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Appellee.*

Before LUMBARD, Chief Judge, and SWAN, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL, Circuit Judges.

PER CURIAM.

Upon consideration of the brief filed by the United States as amicus curiae on the rehearing in banc at the request of the Court and the additional briefs of the parties, the Court considers further development of the facts to be desirable before disposition of the important issues

of law that have been raised. To that end, we alter the decision of the panel, 326 F. 2d 117 (2 Cir. 1964), vacate the judgment of the District Court dismissing the petition, and remand the case to the District Court with instructions to take such evidence as is relevant to the contentions of the parties and to make a further determination in the light thereof and the arguments made thereon by the parties and, if the District Court deems desirable, by the United States. The costs of this appeal will abide the ultimate determination.

SWAN, *Circuit Judge*, did not participate in this decision.

MARSHALL, Circuit Judge,

I dissent and would adhere to the decision of the panel.

Decision of the Panel

(January 7, 1964)

[326 F. 2d 117]

Before SWAN, CLARK and MARSHALL, Circuit Judges.

PER CURIAM:

Respondent chartered the petitioner's tanker *Atlantis* to carry grain from Texas to Greece.[1] At Piraeus, Greece, the Respondent designated a berth at which the *Atlantis* could not safely lie afloat and sustained damage for which the Respondent disclaimed responsibility. The charter party contained an arbitration clause. Petitioner appointed an arbitrator and, in reliance on § 4 of the Arbitration Act, 9 U.S.C.A., moved in the court below for an order directing

[1] The grain was purchased under an agreement between the United States and Greece made pursuant to the Agricultural Trade Development and Assistance Act, 7 U. S. C. A. § 1691 *et seq.*

Respondent to appoint one.[2] The Greek Ambassador to the United States, appearing specially, suggested want of jurisdiction to sue a sovereign state without its consent. Judge Dawson so held. The petitioner has appealed. It contends that the court erred in accepting the unsupported suggestion of the Greek Ambassador and should have required the Respondent to establish its right to immunity through channels of our State Department.

The narrow issue presented by the appeal is one which was settled for this court in *Puente* v. *Spanish National State,* 2 Cir., 116 F. 2d 43, cert. den. 314 U.S. 627. There the plaintiff sued for legal fees. No appearance was entered for defendant, but the Spanish Ambassador to the United States submitted to the Clerk of the District Court a letter which stated "that under prevailing principles of international law the Spanish Government as a Sovereign State is not subject to suit in your Court without its consent, which in this case it declines to accord." In a well-reasoned and lucid opinion (in which Judge L. Hand and Judge Chase concurred) Judge Clark stated that the question for decision is "how the conceded immunity of a friendly foreign state from suit without its consent is to be presented to a court." The Ambassador's letter was held sufficient. The opinion points out the distinction between cases where this is true and those where a foreign sovereign lays claim to a vessel over which the District Court has already acquired jurisdiction. In the latter type of case, of which *Ex parte Muir,* 254 U.S. 522 is an illustration, the foreign sovereign must establish through channels of our State Department its right to immunity. The Supreme Court has never, so far as we are advised, limited in any way the *Puente* decision.

The judgment is affirmed.

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[2] It should be noted that the arbitration clause provided that "for the purpose of enforcing any award, this agreement may be made a rule of the Court." Petitioner's suit sought an order directing appointment of an arbitrator, not an order *enforcing an award.*

CLARK, *Circuit Judge* (dissenting):

In *Puente* v. *Spanish Nat. States*, 2 Cir., 116 F. 2d 43, 45, cert. denied 314 U.S. 627, a case where, as we said, "there is no vestige of apparent jurisdiction," we stated this important limitation on the defense of sovereign immunity: "When a court appears to have all the elements of jurisdiction of an action, it is not improper to require of even a sovereign who would oust it of that jurisdiction that he furnish due proof to support his claim."[1] While our illustrative examples naturally concerned cases we had had, to wit, foreign vessels within the district court's jurisdiction, we expressly declined to limit the rule to particular instances, and indeed in contemporary cases we recognized the controlling importance of State Department pronouncements as to immunity claims. See, e.g., *Sullivan* v. *State of Sao Paulo*, 2 Cir., 122 F. 2d 355; *United States ex rel. D'Esquiva* v. *Uhl*, 2 Cir., 137 F. 2d 903, 906-907; see also *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 38: "We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked has not seen fit to recognize."

But it is most important to note that in later authorities not mentioned below or here, the law to which these cases pointed has been explicitly stated and the defense of sovereign immunity definitely restriced in cases involving the commercial activities of a foreign state.[2] In the now well

[1] The *Puente* case—unlike the *Sullivan* case—has never been cited in the Supreme Court and very rarely (almost never in recent years) in lower federal courts, undoubtedly because the later events recounted in the text showed it a less extensive precedent than as here cited.

[2] For discussion of this trend see, e.g., Timberg, *Expropriation Measures and State Trading*, 1961 Proc. Am. Soc. Int. L. 113, 118.

known and important "Tate letter" of May 19, 1952, on behalf of the Secretary of State to the Attorney General, by Professor Jack B. Tate, then Acting Legal Adciser to the Secretary, the Department expressly clarified its position and in a reasoned exposition citing precedents set forth its future policy "to follow the restrictive theory of sovereign immunity"—applicable to a sovereign engaged "in comercial activities"— and to limit the claim of immunity accordingly. 26 Dept. State Bull. 984 (1952). This was followed in *National City Bank of New York* v. *Republic of China*, 348 U.S. 356, 361, in saying that "[r]ecently the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government," with citation to the Tate letter. And since that time (1952) it appears to have been common practice to seek or await State Department advice before a grant of this and other forms of immunity is made. Among illustrative cases we may cite *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 2 Cir., 210 F. 2d 375, where we reversed a previous ruling when informed of a State Department release to the contrary; and *Banco Nacional de Cuba* v. *Sabbatino*, 2 Cir., 307 F. 2d 845, 855-858, cert. granted 372 U.S. 905, containing a full discusison, with extensive citations, of the role of the State Department in civil litigation in the federal courts. See also *Rich* v. *Naviera Vacuba, S. A.*, 4 Cir., 295 F. 2d 24.

Here the district court, in granting immunity, without any advice whatever from the State Department, in a case involving a grain sale to, and an agreement to arbitrate by, the Kingdom of Greece, thus accorded that Kingdom a special privilege, contrary to the principles stated above. Before taking such a course the district judge should have asked the respondent to advise him as to the State Department's position with reference to its claim of immunity or should himself have directed an inquiry to the Secretary of State. There was particular reason to do so here, as this concerned not the enforcement of a final decree, but merely

the preliminary step of requiring the respondent to appoint an arbitrator, as it had agreed in its contract to do. See for such an order against a foreign corporation under similar circumstances, *Farr & Co.* v. *Cia. Intercontinental De Navegacion De Cuba, S. A.*, 2 Cir., 243 F. 2d 342. The circumstances of consent to the arbitration of what appears clearly to be a commercial transaction suggest a good possibility that the Department which has the responsibility (as we do not) for control of our foreign relations will not support the defense of immunity here. As it stands, the district court has assumed to interfere most discriminatorily in delicate foreign relations not entrusted to its responsibility, and a majority of the court now supports the interference: Had this ever been the law and common practice, it is surely not so now. I would reverse and remand for ascertainment of the State Department's position as to this immunity claim.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Memorandum Decision and Order of the Honorable Archie O. Dawson

MATTER OF THE PETITION OF PETROL SHIPPING CORPORATION

63 Civ. 142

This is a petition by Petrol Shipping Corporation, owner of the Tanker *Atlantis*, for an order directing the Kingdom of Greece to proceed to arbitration. Petrol Shipping Corporation and the Kingdom of Greece were parties to a contract by which the Tanker *Atlantis* was chartered for the carriage of a cargo of grain from Houston, Texas to Greece. The charter party contained an arbitration clause. The cargo to be carried was apparently a cargo of bulk grain which was sold by the United States to the Kingdom

of Greece under Title I of Public Law 480 providing for the sale of surplus agricultural commodities.

The Greek Ambassador to the United States has filed on this motion a suggestion of lack of jurisdiction by reason of sovereign immunity asserting that the Kingdom of Greece asserts its sovereign immunity to suit in this action.

That Greece is a sovereignty and a nation friendly to the United States is a matter of which this Court may take judicial notice. No dispute has been raised as to the authority of the Greek Ambassador to file this suggestion of sovereign immunity.

Since the motion seeks to compel on order directing a sovereign state to take certain action, and since the recognized Ambassador of that state has raised the question of sovereign immunity, this Court must *ab initio* consider whether it has any authority to take the action sought. The law is clear that a foreign sovereign is immune from suit in courts of the United States unless it gives its consent to such suit. *Guarantee Trust Co. of N. Y.* v. *United States,* 304 U.S. 129, at p. 134; *Principality of Monaco* v. *Mississippi,* 292 U.S. 313 (1934). An order of this court, directing the Kingdom of Greece to proceed to arbitration, cannot be entered against such sovereign state unless it waives its immunity to the action.

There is an indication in the memorandum submitted in support of the motion that the Government of Greece, by a letter dated January 3, 1962, had authorized their Foreign Trade Administrator in Washington, D. C. to nominate an arbitrator for this arbitration. If this is so, it is the voluntary act of the Kingdom of Greece and it is to be hoped that arbitration may proceed in this voluntary manner. If the Government of Greece is ready to proceed with the arbitration there is no occasion for this Court to direct them to arbitrate. If it is not ready to proceed to arbitration, but

prefers to rely on its sovereign immunity, there is no jurisdiction in this Court to compel it to act.

The motion is denied.

So ordered.

ARCHIE O. DAWSON,
U. S. D. J.

Dated: New York, N. Y.
February 21, 1963.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 489

KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE,

Petitioner

v.

PETROL SHIPPING CORPORATION,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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No.

KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE,

Petitioner

v.

PETROL SHIPPING CORPORATION,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

The petitioner, the Ministry of Commerce, Purchase Directorate of the Kingdom of Greece (hereinafter denominated Charterer) and the respondent, Petrol Shipping Corporation, a New York corporation (hereinafter denominated Shipowner) entered into a written voyage-charter in the City of New York for the carriage of a cargo of grain by the U. S. Flag Tanker ATLANTIS from Houston, Texas and/or Baton Rouge, Louisiana, to Piraeus, Greece. The grain to be carried by the vessel was purchased by the Charterer from the United States under the credit provisions of Public Law 480 and so was required to be carried in a United States Flag vessel.

The charter party, which Charterer admits is subject to the Rules and Regulations of the United States Department of Agriculture, contained the following standard arbitra-

tion clause (Petitioner's Appendix hereinafter cited as "Pet.", Respondent's Appendix hereinafter cited as "Resp."):

> "Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men". (Pet. 2a).

In the performance of the charter the *Atlantis* suffered substantial damage at the discharge berth in Piraeus for which the Shipowner made claim against the Charterer on the ground that the discharging berth was an unsafe berth. Upon disclaimer by the Charterer, the Shipowner notified the Charterer by letter dated September 29, 1961 of its appointment of its arbitrator, under the above clause, and demanded that the Charterer appoint its arbitrator so that the dispute between the parties concerning responsibility for the ship's damage could be determined by arbitration, in accordance with the agreement (Resp. 4a).

The Shipowner, upon Charterer's failure to comply with the foregoing demand made a further demand by letter dated December 15, 1961 (Resp. 5a). The Charterer then advised that it had authorized the Greek Government Foreign Trade Administration in Washington to proceed forthwith (Resp. 14a).

The Charterer in spite of its notices that it would proceed forthwith, neglected to name its arbitrator. Whereupon the Shipowner, by motion returnable January 29, 1963, petitioned the United States District Court for the Southern District of New York for an order directing the Charterer to proceed with the arbitration (Resp. 3a-5a).

At the request of the Charterer's attorney, the parties stipulated the adjournment of the argument of the motion

to February 19, 1963. The stipulation was signed by the attorney for the Charterer and contained no reservations with respect to his authority (Resp. 34a).

The Charterer opposed the motion, submitting in opposition a brief affidavit entitled "Suggestion of Greek Ambassador", merely stating that the Kingdom of Greece is a friendly sovereign power which is not subject to suit without its consent, which the Ambassador stated it declined to accord, and further asserting its sovereign immunity (Resp. 10a, 11a). No assertion or claim was made respecting service of the motion papers.

The Charterer also submitted in opposition the affidavit of the Director of the Office of Foregn Trade Administration, Ministry of Commerce, Kingdom of Greece, which amounted to no more than a concession that the aforesaid charter party had been entered into and that the cargo was purchased by the Greek Government from the U. S. Department of Agriculture under Public Law 480, which required 50% of such cargoes to be carried in United States Flag ships (Resp. 12a, 13a).

As hereinbefore stated the Charterer refused to nominate its arbitrator and claimed sovereign immunity, although it had notified the Shipowner on January 3, 1962, after the Shipowner demanded arbitration, that it had authorized the Greek Government Foreign Trade Administration in Washington, D. C., to nominate its arbitrator (Resp. 14a). Movant Shipowner urged that this circumstance clearly demonstrated that the Charterer's claim for sovereign immunity was unfounded.

On February 21, 1963, District Judge Dawson dismissed the Shipowner's petition, stating:

> "If [the Kingdom of Greece] is not ready to proceed to arbitration, but prefers to rely on its sovereign immunity, there is no jurisdiction in this Court to compel it to act. The motion is denied" Pet. 26a, 27a).

The Shipowner appealed the denial of its petition to a panel of the 2nd Circuit Court of Appeals consisting of

Judges Swan, Clark and Marshall. On January 7, 1964 the district court was affirmed (326 F. 2d 117) on the authority of *Puente* v. *Spanish National State,* 116 F. 2d 43 (2nd Cir. 1940) *cert. denied,* 314 U.S. 627. The panel was not unanimous and it was Judge Clark, the writer of the *Puente* decision, 24 years before, who dissented. Judge Clark urged at page 118 that the case be reversed and remanded for ascertainment of the State Department's position as to the claim of sovereign immunity.

The Shipowner's application for rehearing *en banc* by the Circuit Court was granted. That Court upon reconsideration remanded the case for the further development of facts, particularly with regard to the position of the United States Government (Pet. 21a).

Upon remand the Charterer finally and for the first time in this proceeding made a formal request of the State Department that sovereign immunity be granted to it. This plea was made though the transaction involved was of a manifestly commercial nature. In presenting its request the Charterer stated in part to the State Department as follows:

> "The assertion of personal jurisdiction by the United States courts over the Kingdom of Greece is contrary to established principles of international law governing the comity of nations" (Resp. 18a).

The request for recognition of the Charterer's assertion of sovereign immunity, considered with care and prudence in the national interest, was absolutely refused. The refusal by the State Department was terse but contained the rationale of its necessity:

> "As the Embassy is probably aware, it is the practice of the Department of State when considering requests for recognition of sovereign immunity from suit by foreign governments to follow the policy set forth in its letter of May 19, 1952, to the Acting Attorney General, the so-called Tate letter, a copy of which is enclosed. Applying that policy to the facts

in the case under consideration, the Department sees no basis for any conclusion other than that the acts on which the suit is based are private acts (*jure gestionis*). In these circumstances, the Department regrets that it is unable to comply with the request of the Ambassador of the Kingdom of Greece for recognition of sovereign immunity from suit in the instant case.

"It follows that the other questions raised by the Memorandum attached to the Ambassador's note are matters for the Court" (Resp. 21a, 22a).

Considering this action of the United States, through the State Department, as well as the documentation and stipulations of counsel in the framework of authority supplied by *Victory Transport, Inc.* v. *Comisaria General,* 232 F. Supp. 294, aff'd., 336 F. 2d 354 (2d Cir. 1964), *cert. denied,* 381 U. S. 934, which involved the Spanish government, District Judge Feinberg granted the Shipowner's motion to compel arbitration. The U. S. Court of Appeals for the Second Circuit affirmed by opinion which searchingly examined Charterer's contentions with respect to jurisdiction and sovereign immunity.

Argument

The petition for a writ of certiorari should be denied for the following reasons:

1. This Court has already denied certiorari relief in *Victory Transport, Inc.* v. *Comisaria General, supra,* a case on all fours with the case at bar and with facts so similar as to nearly attain a geometrical congruity.

2. The Charterer has been able to point to no substantive conflict between Circuit Court decisions on the subject matter in this suit, nor is there any conflict between the decision of the Circuit Court herein and the decisions of the United States Su-